FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 17 1944
CHARLES ELMORE CROPLEY
CLERK

No. 27

In the Supreme Court of the United States

OCTOBER TERM, 1944

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

HELMERICH & PAYNE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 27

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

HELMERICH & PAYNE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

This reply brief is submitted because of a statement on page 4 of respondent's brief concerning a "fact" on which "the record is silent". Respondent says:

> The record is silent as to the reason for this abandonment [of the split-day plan], although, as a matter of fact, it was done because of an arrangement (initiated by respondent) between the American Association of Oil Well Drilling Contractors (of which respondent was a member) and

613467 44

> Philip B. Fleming, Administrator of the Wage and Hour Division of the Department of Labor, by which the members of said association signified their intention to abandon the use of employment contracts similar to the one in issue. * * *

Although this asserted reason for the voluntary discontinuance by respondent of the Poxon contracts would not appear to be relevant to the issue of mootness, the facts concerning the so-called "arrangement", together with relevant subsequent correspondence, are set forth briefly here for the convenience of the Court, since they are not in the record.

It appears from the material which follows (1) that the arrangement referred to was not to affect pending suits and in particular was not to affect the instant action; (2) that there was no agreement that the parties would not revert to the split-day contracts if their validity was sustained in such suits, and (3) that the arrangement did not eliminate the controversy between the parties because the respondent continued to contend that its contracts were legal and that it should therefore be free to resume their use.

The arrangement to which respondent refers is set forth in an exchange of letters between the American Association of Oil Well Drilling Contractors and the Administrator of the Wage and Hour Division. The Association by letter dated July 7, 1941, on behalf of its members "pro-

pose[d] to comply with the Act beginning July 15, 1941", as interpreted by the Administrator with respect to several points specified by the letter. The proposal involved, among other things, the discontinuance of the split-day agreements and the payment of an hourly rate and time and one-half that rate for all hours worked each week in excess of 40. The relevant portions of the letter follow:

JULY 7, 1941

General PHILIP B. FLEMING
Administrator, Wage and Hour Division
United States Department of Labor,
Washington, D. C.

DEAR GENERAL FLEMING: Pursuant to the arrangement made with you at the meeting in your office on June 20, 1941, between representatives of leading oil well drilling contractors and you and your associates, we have with your approval formulated this arrangement which has been presented to and approved by representatives of 300 oil well drilling contracting companies or individuals operating 1,252 drilling rigs.

Enclosed herewith is a list of such companies which show the number of rigs operated by each, and all those listed have authorized me to execute this letter in their behalf. The industry understands there is no objection under the law to an employer reclassifying or recontracting with employees now on a wage or salary basis so as

to put them on an hourly basis, and no objection to hiring new employees on an hourly basis so long as the hourly rates are not fixed below the minimum provided in the Act and new rates are established in good faith and strictly adhered to and the employees are paid time and one-half for all hours worked each week in excess of 40. This ability to reclassify or re-contract shall extend to agreement with existing employees relating to new or additional employment to be performed by them. The industry further understands that you consider it a violation of the Act for an employer to adopt the so-called "6–2" plan or any other similar plan whereunder the regular workday of 8 hours is divided into a certain number of straight time hours and a certain number of overtime hours. The industry also understands that the Wage and Hour Division has characterized the so-called "6–2" and other similar plans as fictitious bookkeeping devices which violate the Act.

* * * * * *

On the basis of the foregoing understandings, the members of the industry represented herein, including those already complying with the Act, propose to comply with the Act beginning July 15, 1941.

It is further understood that, excepting the two or three oil well drilling contractors against whom suits have been instituted or authorized by the Administrator, and excepting complaints filed for violations oc-

curring after July 15, 1941, you will not cause an inspection or investigation to be made of any member of the industry represented herein before January 15, 1942.

The industry further understands that with the exceptions noted in the preceding paragraph, you will not recommend or institute legal action based solely upon violations occurring before July 15, 1941, nor will you require any member of the industry represented herein to make restitution of wages for any claimed violations of the act prior to July 15, 1941, unless such member shall be found to be in violation after July 15, 1941, in which case you reserve the right to enforce compliance with the Act since its effective date against any employer who shall not comply with the Act after July 15, 1941, in accordance with the above understandings.

It is of course understood that in the event of any employee suits brought against members of the industry, the Division may feel itself obliged to intervene if questions of coverage or other legal issues are raised.

I shall appreciate it if you will acknowledge this letter and confirm the arrangement herein set forth.

Yours very truly,

[s] BRAD MILLS

Brad Mills,

Secretary American Association of Oil Well Drilling Contractors

1820 Republic Bank Building

Dallas, Texas

On July 26, 1941, the Administrator replied confirming "with slight modification" the understanding set forth in the Association's letter of July 7, 1941. The qualification was to remove any limitation on the number of suits which the Administrator might feel it necessary to bring against oil well drilling contractors for violations occurring before July 15, 1941. The relevant portion of the Administrator's letter follows:

> This letter will confirm, with slight modifications, hereinafter noted, the understanding set forth in your letter of July 7.
>
> * * * * * *
>
> In the third full paragraph of page 3 of your letter you state that you understand that "excepting the two or three oil well drilling contractors against whom suits have been instituted or authorized by the Administrator, and excepting complaints filed for violations occurring after July 15, 1941, you will not cause an inspection or investigation to be made of any member of the industry represented herein before January 15, 1942." While we are not certain of the number of suits which may be instituted against oil well drilling contractors, we would prefer not to be limited to the bringing of "two or three" such suits. It may be that no more than two or three suits actually will be instituted but we prefer not to be restricted so specifically in the number of suits which may be brought. With this understanding, the paragraph of

the letter in question will be understood to read as though the words "two or three" were deleted therefrom.

In all other respects, I agree with the understanding set forth in your letter of July 7.

It will be noted that both parties understood that the arrangement was not to affect pending suits. It will also be noted that there was no understanding that the employers would not revert to the split-day contracts if their validity was sustained in such suits. The specific undertaking was "to comply with the Act beginning July 15, 1941" (*supra*, p. 4).

On August 5, 1941, respondent's counsel wrote to the Administrator suggesting that the pending action be discontinued. That letter is as follows:

SETTLE, MONNET & CLAMMER
TULSA, OKLAHOMA

AUGUST 5, 1941

Re: *Philip B. Fleming, Admr., of the Wage and Hour Division, plaintiff*, vs. *Helmerich & Payne, Inc., Defendant*, No. 568 Civil, U. S. District Court, Northern District of Oklahoma

General Philip B. Fleming
Administrator Wage and Hour Division United States Department of Labor, Washington, D. C.

DEAR GENERAL FLEMING: The above indicated action was an action filed May 3, 1941, which sought to enjoin the defendant,

Helmerich & Payne, Inc., a drilling contractor with headquarters in Tulsa, Oklahoma, from paying wages to its employees in the manner provided in its contract with said employees on the grounds that same violated the Fair Labor Standards Act.

This company was paying wages under written contracts with each of its employees on what we term a daily division of regular time and over-time. That is, most of its employees work on what are called "towers" of eight hours each. Each tower was divided into two equal parts, the first four hours being paid at regular hourly rate and the second four hours at time and a half. On a 56 hour week this resulted in 28 hours being paid at regular time and 28 hours at time and a half.

Since that time the Association of Drilling Contractors has entered into an arrangement with your office by which they are paying their men various regular rates in excess of the minimum for the first 40 hours of each week and time and a half thereafter, and your office has indicated that if this was done you would, in most instances, overlook any prior irregularities.

Helmerich & Payne, Inc., was not only one of the contractors in this group, but was the original contractor who, at the suggestion of your local representative, Mr. Jas. P. Crowe, initiated the association of these contractors for this purpose. This company has changed its system of paying

its employees as above indicated and we are wondering if you consider it necessary to continue the prosecution of the above indicated action, which really now involves a moot question.

We would appreciate it if you would let us know at your early convenience your disposition in regard to this matter.

Yours respectfully,

SETTLE, MONNET & CLAMMER

By /s/ EUGENE O. MONNET

* * * * *

On August 13, 1941, the Administrator replied as follows:

AUGUST 13, 1941

EUGENE O. MONNET, Esquire
Settle, Monnet & Clammer
Suit 1001 Philtower Building
Tulsa, Oklahoma

Re: *Fleming* v. *Helmerich & Payne, Inc.*

DEAR MR. MONNET: We acknowledge receipt of your letter of August 5, 1941, with reference to the above-entitled action.

In your letter you state that, since Helmerich & Payne, Inc., was one of the original contract oil diggers who initiated the plan of compliance whereby the Association of Drilling Contractors entered into a compliance arrangement with the Wage and Hour Division, and since the company has now changed its system of paying its employees, and the questions involved in the above-entitled action are moot, you wonder

whether we feel it is necessary to continue the prosecution of said action.

In our letter of July 26, 1941, to Mr. Brad Mills, Secretary, American Association of Oil Well Drilling Contractors, we specifically stated:

"In the third full paragraph of page 3 of your letter you state that you understand that 'excepting the two or three oil well drilling contractors against whom suits have been instituted or authorized by the Administrator, and excepting complaints filed for violations occurring after July 15, 1941, you will not cause an inspection or investigation to be made of any member of the industry represented herein before January 15, 1942.' While we are not certain of the number of suits which may be instituted against oil well drilling contractors, we would prefer not to be limited to the bringing of 'two or three' such suits. It may be that no more than two or three suits actually will be instituted but we prefer not to be restricted so specifically in the number of suits which may be brought. With this understanding, the paragraph of the letter in question will be understood to read as though the words 'two or three' were deleted therefrom."

Our complaint was filed against Helmerich & Payne, Inc., on May 3, 1941, two months before the compliance arrangement was entered into. By the terms of our letter of July 26, 1941, the arrangement

does not apply to this company. Consequently, we see no reason why our complaint should be dismissed.

Sincerely yours,

PHILIP B. FLEMING
Administrator.

On August 15, 1941, counsel for respondent replied to the Administrator's letter:

SETTLE, MONNET & CLAMMER
TULSA, OKLAHOMA

AUGUST 15, 1941

Re: *Philip B. Fleming, Admr., of the Wage and Hour Division, Plaintiff,* vs. *Helmerich & Payne, Inc., Defendant,* No. 568 Civil, U. S. District Court Northern District of Oklahoma

General PHILIP B. FLEMING
Administrator Wage and Hour Division
United States Department of Labor,
Washington, D. C.

DEAR GENERAL FLEMING: I acknowledge receipt of your letter of August 13th in regard to above indicated matter and have carefully noted the contents of the same.

My letter apparently did not convey the impression to you that I intended. Neither myself nor my clients believe or contend that your office is in any way obligated under the recent arrangement with the Drilling Contractors' Association to dismiss this action. I merely wished to convey the thought that since the action was brought

to enjoin the defendant from paying wages upon a basis which defendant is no longer using, that the action was moot and no useful purpose could be complished in continuing the action, however, we have always been of the opinion that the method we used did not violate the Fair Labor Standards Act and will be very glad to test the legality of this method.

Yours respectfully,

SETTLE, MONNET & CLAMMER

By [s] EUGENE O. MONNET

Reference has already been made to the subsequent letter of respondent's counsel to the District Court Judge admitting that the action was not moot (Pet. Brief, p. 18, n. 14). Attention has also been directed to the fact that two of the three wage agreements substituted in July 1941 for the split-day contracts were assailed by the Administrator at the trial of this action as not being in compliance with the overtime requirements of the Act, and one of them, the "X" plan, was enjoined by the court below. See Petitioner's Brief, pp. 10–11, notes 10 and 11. The arrangement to which petitioner refers clearly contemplated that payment was to be on a straight hourly basis plus time and a half for each hour worked beyond 40.

We respectfully submit that the foregoing arrangement and the subsequent correspondence of the parties do not support the contention that the

present case is moot but, rather, point to the contrary conclusion.

CHARLES FAHY,
Solicitor General.
IRVING J. LEVY,
RALPH F. FUCHS,
Department of Justice.

DOUGLAS B. MAGGS,
Solicitor.
HARRY M. LEET,
Attorney,
United States Department of Labor.

OCTOBER 1944.

U. S. GOVERNMENT PRINTING OFFICE 1944